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INTERSTATE COMMERCE IN INTOXICATING LIQUORS BEFORE THE WEBB-KENYON ACT.*

IV. The Narrowing of the Wilson Act.

NOT many cases were decided under the Wilson Act, however, until the Supreme Court of the United States began to dispel the illusion that at last the states had authority to make their police laws concerning the manufacture and sale of intoxicating liquors completely effective through imposing restrictions upon the right to import. The first state statute to come before the Court was the South Carolina Dispensary Law of January 2, 1895, which was entitled "An act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation, and disposition of alcoholic liquids or liquors within the State of South Carolina and to police the same." But this measure expressly recognized liquors as commodities that might be made and sold by state functionaries to whom these operations were entrusted.[1]

The Court said:[2]

> "It is not an inspection law. The prohibition of the importation of the wines and liquors of other States by citizens

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*Editorial Note: The first two parts of this paper appeared in the December and January numbers of this volume of Virginia Law Review, pp. 174, 288.

[1] Scott *v.* Donald, 165 U. S. 58 (1897). A state commissioner was required to purchase all intoxicating liquor and to furnish it to the county dispensaries to be sold in sealed packages. Manufacturers within the state could sell only to the state commissioner or to parties outside the state, and the supplies had to be purchased from the local manufacturers if their product reached the required standard and the price was no more.

[2] At pp. 99, 100. Mr. Justice Brown, dissenting, argued that the South Carolina law was constitutional. "The effect of this enactment," he said, "seems to me to withdraw intoxicating liquors from the operation of the commerce clause of the Constitution, and to permit the traffic in them to be regulated in such manner as the several States, in the exercise of their police powers, shall deem best for the general interests of the public." (p. 102).

> of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles. Only the state functionaries are permitted to import into the State. * * *
>
> "It is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the Act of Congress of August, 1890. The law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. * * * evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

Importations for personal use were thus permitted, but the ground of the decision was that the South Carolina law expressly recognized liquors as lawful articles, and thus discriminated against interstate commerce. The fault was with the character of the South Carolina legislation rather than with the inadequacy of the Wilson Act, for this did not confer on the states such power as was sought to be exercised.

In this decision, consequently, there was nothing to cause the prohibition advocates any particular alarm; but on May 9 of the next year (1898) the Supreme Court in deciding two cases practically held that the Wilson Act could not give the states the relief they asked for and still be constitutional.

An Iowa law forbade any common carrier to transport liquors without a certificate from the auditor of the county of destination showing that the consignee was authorized to sell them, and the question presented to the Supreme Court was whether the

carrier's agent who knew that a package contained liquor could be punished for transporting it: that is, whether the Iowa law applied to a shipment from outside the state before the arrival and delivery of the merchandise to the consignee without being repugnant to the federal Constitution. This law, as Mr. Justice White who delivered the opinion of the Court[3] pointed out, was identical with the one declared repugnant to the Constitution by the Bowman case.[4] The question then was whether the Wilson Act validated the state law.

The language of the Wilson Act, Mr. Justice White argued, made it impossible to hold that "arrival" referred to the state line. The conditions of "use, consumption, sale, or storage therein" were enumerated, and this indicated that "arrival" did not take place until the liquors reached the consignee. "The subtle signification of words, and the niceties of verbal distinction," he said, "furnish no safe guide for construing the act of Congress," and continued:[5]

> "Undoubtedly the purpose of the act was to enable the laws of the several States to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case, but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the States the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders as to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another State, the necessary effect must be to give the laws of the several States extraterritorial operation, for, as held in the Bowman case, the inevitable consequences of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the State for such shipments. If the construction claimed be upheld, it would be in the power of each State to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the State mer-

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[3] Rhodes *v.* Iowa, 170 U. S. 412 (1898).

[4] Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465 (1888). *supra*, p. 187, *et seq.*

[5] At pp. 421, 422.

chandise of the character named covered by the inhibitions of a state statute."

It would have been very easy for Congress, said Mr. Justice White, to have clearly expressed its purpose if it had meant state lines, and it was reasonable to conclude from the facts that the Bowman case had been decided in 1888, the Leisy case [6] in April 1890, and the Wilson Act [7] passed in August of the same year, that Congress by this statute intended to extinguish the existing right, established by the decision of the Court in Leisy *v.* Hardin, to sell in the "original packages". Furthermore, this right to sell was but an incident of interstate commerce, while the Court said: [8]

"On the other hand, the right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed."

Thus holding that "upon arrival" applied to the consignee, there was no necessity "to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to state control it would be repugnant to the Constitution," the implication being that if the states were empowered to restrict importations for personal use, Congress would have unconstitutionally delegated its legislative authority. The correctness of this implication is supported by subsequent decisions, notably one where it was said: [9]

"The Court [in Rhodes *v.* Iowa] declined to express an opin-

[6] Leisy *v.* Hardin, 135 U. S. 100 (1890), *supra*, pp. 192, 194.
[7] 26 Stat. L. 313, *supra*, p. 294, *et seq.*
[8] At p. 424.
[9] American Express Co. *v.* Iowa, 196 U. S. 133, 142 (1905).

ion as to the authority of Congress, under its power to regulate commerce, to delegate to the States the right to forbid the transportation of merchandise from one State to another." [10]

In Vance *v.* Vandercook Co.,[11] the case decided by the Court with that of Rhodes *v.* Iowa, the question was as to the validity of the South Carolina dispensary legislation, which had been changed so as to eliminate the clauses which were held to be a discrimination but continued to confer on state officers the exclusive right to buy all liquor that was to be sold in the state and to dispose of it. There was thus presented to the Supreme Court the question which was reserved in Scott *v.* McDonald—was it competent for a state, in the exercise of its police power, to monopolize the traffic in intoxicating liquors? Mr. Justice White said: [12] "The manifest purpose of the act of Congress was to subject original packages to the regulations and restraints imposed by the state law. If the purpose of the act had been to allow the state law to govern the sale of the original package only where the the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other States." The police power cannot be restricted "to the mere right to forbid" and denied "any and all authority to regulate or restrict."

One provision of the South Carolina law required a citizen, desiring to order liquor for his own use, to communicate his purpose to the state chemist with a sample of the liquor to be purchased, and to secure from him a certificate permitting the

[10] There was a strong dissent by Justices Gray, Harlan, and Brown. They showed that the two cases previously decided (In re Rahrer, 140 U. S. 545, *supra*, p. 301, *et seq.*, and Scott *v.* Donald, *supra*) had not intimated that the language of the Wilson Act would be thus limited; that the plain purpose of Congress was not to restrict the authority of the state. Chief Justice Marshall was quoted in support of their contention that "arrival" should refer to the state line. The Patriot, 1 Brock. 407, Fed. Cas. 13, 985 (1820).

[11] 170 U. S. 438 (1898). [12] At p. 448.

importation if the sample was found to be free from any poisonous, hurtful or deleterious matter.

The Court said: [13]

> "On the face of these regulations, it is clear that they subject the constitutional right of the nonresident to ship into the State and the resident of the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges.[14] The right of a citizen of another State to avail himself of Interstate Commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina, and finds its support in the Constitution of the United States. Whether or not it may be exercised depends solely upon the will of the person making the shipment, and cannot be in advance controlled or limited by the action of the State in any department of its government."

Such a regulation was not in the slightest degree an inspection law, for "the sample may be one thing and the merchandise which thereafter comes in another." This portion of the law was hence held unconstitutional, and the resident of the state could import liquors for his own use, the local authority not being permitted to interfere until the packages reached him.[15]

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[13] At p. 455.

[14] In Vance *v.* Vandercook Co. there occurs that much quoted *dictum:* "But the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of state law." (p. 452).

[15] There was a strong dissenting opinion by Mr. Justice Shiras, the Chief Justice (Fuller) and Mr. Justice McKenna. They argued that "if the act of Congress can validly operate to authorize the State to forbid the sale in original packages of imported articles of the same kind with those whose manufacture and sale within the State are regulated and permitted, I am unable to see why it cannot also operate to authorize the State to forbid the importation for use. Once concede that it is competent for Congress to abdicate its control over Interstate Commerce in articles whose manufacture, sale and use are lawful

The question then arose as to the validity of Iowa legislation which forbade consignments to be paid for on delivery—C. O. D. shipments—on the ground that, by reason of the nature of the contract, the sale took place in the state of destination. Mr. Justice White held this argument untenable. The Supreme Court had in many cases asserted "the broad principle of the freedom of commerce between the States and of the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in States where made." It was true that there had been a diversity of opinion concerning the effect of a C. O. D. shipment—as to the time delivery was completed and as to the respective risks of the seller and buyer. In this particular case, however, the contract was unquestionably completed in Illinois, and the shipment constituted interstate commerce. To decide that the transaction could be made unlawful, "would require us to decide that the law of Iowa operated in another State so as to invalidate a lawful contract as to interstate commerce made in such other State; and, indeed, would require us to go yet further, and say that, although under the interstate commerce clause a citizen in one State had a right to have merchandise consigned from another State delivered to him in the State to which the shipment was made, yet that right was so illusory that it only obtained in cases where in a legal sense the merchandise contracted for had been delivered to the consignee at the time and place of shipment." The Iowa law was therefore declared inoperative and the Court refused "to cripple if not destroy that freedom of commerce between

within the State, and to confer upon the State the power to forbid importation of such articles for *sale*, it must follow that it would be equally competent for Congress to authorize the State to forbid the importation of such articles for *use*. And, conversely, if it be not competent for Congress to authorize a State to forbid the importation for use of articles whose use in domestic commerce is lawful, so it would not be competent for Congress to authorize a State to forbid the importation for sale of articles whose sale in domestic commerce is lawful." (p. 461). These justices denied that Congress could authorize the state in either case.

the States which it was the great purpose of the Constitution to promote." [16]

The next state measure to come before the Supreme Court was from Missouri. The statute provided for the inspection of malt liquors manufactured within the state and also of those manufactured without but held within the state for consumption and sale, and was attacked on the grounds that it interfered with interstate commerce and that the inspection charge exceeded the actual cost, making the measure in part a revenue one. These arguments the Supreme Court, Mr. Justice White delivering the opinion, held to be without foundation, and the law was a valid one under the Wilson Act.[17] The Missouri statute was a police measure, operating upon liquors after their arrival and while held for sale and consumption; the state court had determined that the law was a police not a revenue one, and since the police power is measured by the right of a state to control its domestic products, this created a state and not a federal question as respects the commerce clause of the federal Constitution in view of the Wilson Act. It was held, furthermore, to be immaterial that the law might deter importations. The Court said: [18]

> "If when a State has but exerted the power lawfully conferred upon it by the act of Congress its action becomes void as an interference with interstate commerce because of the

[16] American Express Co. *v.* Iowa, 196 U. S. 133, 143, 144 (1905). See also Adams Express Co. *v.* Iowa, 196 U. S. 147 (1905).

[17] Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17 (1905).

[18] At p. 30. Four dissenting justices argued that the law should have been held void, on the grounds that it was not a proper inspection law, that it did not afford protection against impurity, and that the fee charged was thirty times the actual cost of inspection. The right of state inspection, the dissenting opinion said, existed independent of any federal statute. "The Wilson Act neither creates, adds to, takes from or affects the police powers of the State with respect to inspection in any particular. The consequences of this decision seem to me extremely serious. If the States may, in the assumed exercise of police powers, enact inspection laws, which are not such in fact, and thereby indirectly impose a revenue tax on liquors, it is difficult to see any limit to this power of taxation, or why it may not be applied to any other articles brought within the State, and many decisions of the Supreme Court would thus be practically overruled." (pp. 41, 42).

> reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor, yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce by means of which the harmonious workings of our constitutional system has been made possible." [19]

Subsequent decisions of the Supreme Court did little to change the principles here enunciated. It was decided that a reasonable time must elapse for the consignee to receive the goods from the carrier before the authority of the state may attach to imported packages.[20] So also, a Kentucky statute forbidding all C. O. D. shipments, making the place of payment or delivery the place of sale, and holding the carrier and his agents jointly liable with the vendor, interfered with interstate commerce.[21] In the particular case decided, the agent held the shipment for a few days to suit the convenience of the consignee, but this was considered immaterial and not to deprive the transaction of interstate protection.

Only one case seemed to relax these restrictions on state authority. In Delamater *v.* South Dakota,[22] it was decided that the state could impose a license tax upon travelling salesmen who solicited orders for intoxicating liquors to be shipped to

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[19] The state is permitted to exact a license fee, in the exercise of its police powers, for the right to sell intoxicating liquors on a steamboat engaged in interstate commerce. This is because since the passage of the Wilson Act there is a distinction between the right to sell liquors and other business as conducted on such vessels. Foppiano *v.* Speed, 199 U. S. 501 (1905). As to taxation, see Heyman *v.* Hayes, 236 U. S. 178 (1915).

[20] Heyman *v.* Southern Ry. Co., 203 U. S. 270 (1906).

[21] Adams Express Co. *v.* Kentucky, 206 U. S. 129 (1907). A Kentucky statute made it an offense to sell or give liquor to any person who was an inebriate, but this regulation as applied to a common carrier was void, as a regulation of commerce, even under the Wilson Act. Adams Express Co. *v.* Kentucky, 214 U. S. 218 (1909).

[22] 205 U. S. 93 (1907).

the purchasers from other states. The state measure was considered as a police, not a taxing one, following Pabst Brewing Co. v. Crenshaw; and Vance v. Vandercook was distinguished on the ground that while a resident may order liquors for his own use, the solicitation may be forbidden under the Wilson Act. This decision, says a critic, was in spite of the fact that the Court "had already held that the power of the states to regulate intoxicating liquors did not become operative until the liquors had reached their destination. To reach this necessary conclusion, for it was absolutely necessary for the Court to catch up with popular opinion and to appease the prohibition states, legal refinements had to be resorted to.

"It is difficult to understand why the solicitude of the courts over the interstate powers of Congress should be so great as to preclude the state from prohibiting a person from ordering liquor shipped to him from another state or from interfering with that liquor while in transit, but should nevertheless permit the state to prohibit the making of an offer to make a contract for such shipment. Surely in the latter case as in the former the state is regulating interstate commerce." [23]

There is much merit in this contention, but the decision was that the solicitation could be forbidden. Still, this was scant assistance to the state authorities; for when a liquor dealer established an office in Stillings, a village just across the Missouri river from Leavenworth, and conducted his business and received orders in Missouri for delivery in Kansas, the communication being by telephone, the Supreme Court held that he was engaged in interstate commerce and Kansas was powerless to prevent this evasion of its prohibition laws.

Mr. Justice McReynolds said:

> "Former opinions of this court preclude further discussion of these propositions: Beer is a recognized article of commerce. The right to send it from one State to another and the act of doing so are interstate commerce the regulation whereof has been committed to Congress; and a state law which denies such right or substantially interferes with or

[23] A. A. Bruce, "The Wilson Act and the Constitution," 21 GREEN BAG 211, 219, 220 (1909).

hampers the same is in conflict with the Constitution of the United States. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor and prior thereto the provisions of [the Wilson Act] * * * have no application." [24]

And the settled law on the subject was that stated in the recent case of Louisville & N. R. Co. *v.* Cook Brewing Co.[25] Kentucky had passed a statute making it unlawful for any common carrier to bring liquors into territory where their sale was forbidden. This law was sustained so far as intrastate shipments were concerned, but declared invalid as to interstate transactions. Speaking for a unanimous court, Mr. Justice Lurton said:

"By a long line of decisions beginning even prior to Leisy *v.* Hardin it has been indisputably determined:

"a That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

"b That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another.

"c That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition.

"The Wilson act, which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate."

V. The Demand for Further Congressional Legislation.

It was of course to be expected that when the Supreme Court of the United States first began by interpretation of the Wilson Act to hamper the enforcement of state laws, the prohibition advocates would demand additional congressional legislation, relying on the method of federal permission suggested in the two cases before the Wilson Act and the announcement by Congress of its own rule which had been declared to be the case

[24] Kirmyer *v.* Kansas, 236 U. S. 568, 572 (1915). See also Rossi *v.* Pennsylvania, 238 U. S. 62 (1915).

[25] 223 U. S. 70 (1912).

in this statute. Immediately after the decision by the United States Supreme Court of the first of the South Carolina Dispensary Cases,[26] Senator Tillman of South Carolina introduced in the Senate and reported favorably a bill[27] "for the relief of that state from the evils of intemperance." The report from the Committee on Interstate Commerce said that the effect of Scott *v.* Donald was "to throw down all the barriers erected by the State law, in which she is protected by the Wilson Bill, and allow the untrammeled importation of liquor into the State upon the simple claim that it is for private use."[28] Senator Tillman's measure, which passed the Senate on July 15, 1897, but failed in the House, made shipments of liquor subject to local authority "upon arrival within the limits" of the state, and declared that they should not be exempt by reason of being introduced "in original packages for private use." The bill excepted transactions which would effect the internal revenue laws of the United States and liquors in transit through a state or territory.[29]

But the holding in the Dispensary Case had little more than a local application, and it was not until several years after Rhodes *v.* Iowa with its definite limitation of "upon arrival" to the consignee that the demand for action assumed large proportions. The abuses complained of were serious, and it was but a poor aid to state enforcement that the local authority could now prohibit the *sale* in the original packages. It was shown, for example, that as many as one hundred jugs of liquor at a time were found in the express office of an Iowa town, addressed by the consignor to himself as consignee, with no indication that they should all be delivered except to individuals to whom the bills of lading might be assigned after the arrival of the liquors within the state. "Under the decision of the Rhodes case these liquors were not subject to seizure and could be kept there in large quantities in the office of the express company and retailed from there to whomever would pay the

[26] Scott *v.* Donald, *supra.*
[27] S. 224; 55th Congress, 1st session.
[28] 55h Congress, 1st session, Senate Report 151, p. 5.
[29] CONGRESSIONAL RECORD, 55th Congress, 1st session, p. 2612.

case charges, the value of the liquor, and the cost of transportation. This harm has been so flagrantly conducted that the state Supreme Court during the last session ordered a writ of injunction to issue against one of the express companies, enjoining it from maintaining one of its offices as a place wherein to carry on the traffic of intoxicating liquors." [30]

Successive Congresses considered a series of bills amendatory of the Wilson Act and differing only in detail, as the advocates of the legislation had their desires slightly modified by local conditions and their hopes checked by serious arguments against the constitutionality of the measures proposed. Until 1913, however, with the exception of some legislation in the Penal Code of 1909,[31] the efforts to secure action were unavailing; but it will be worth while to indicate some of the more important bills and the reports made upon them, for, while the Webb-Kenyon Act involves different theories, it can be better understood by examining the expedients that were urged before Congress finally acquiesced and made it possible for the states to enforce their laws.

The first to attract any considerable attention was the Hepburn-Dolliver bill.[32] It sought to amend the Wilson Act so as to make it read (italicized words being amendments) that liquors "transported into any State or Territory *for delivery therein*,

[30] Hearings before the Committee on the Judiciary (House of Representatives) on H. R. 4072, "A bill to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," March 2, 1904, p. 8. As the Iowa court pointed out: "These holdings, it is needless to observe, render the power of the state to prohibit the traffic in liquors to a large extent nugatory, and leave the agents of nonresident dealers to ply their trade with boot-leggers and other resident violators of the law without effective hindrance; but we have only to declare the law as we find it. It is proper to add that all these cases under the authority of which this appeal has been disposed of have been decided by a divided court. The dissent of Justices Harlan, Gray, Waite, Shiras, and Brown is supported by very persuasive reasoning and great weight of authority, but, whatever we may think of the comparative merits of the arguments employed, we are in duty bound to follow the authoritative pronouncements of the court, whose decision upon this and kindred questions is final." State *v.* Hanapy, 117 Iowa 15, 90 N. W. 601, 603 (1902).

[31] Secs. 217, 238, 239, 240.

[32] H. R. 4072, 58th Congress, 2d session.

or remaining therein for use, consumption, sale, or storage therein, shall upon arrival *within the boundary* of such State or Territory, *before and after delivery*, be subject to the operation and effect of the laws" of such state as though there manufactured.[33] As recommended by the Committee a second section provided that persons and corporations engaged in the traffic should be subject to local laws "but nothing in this Act shall be construed to authorize a State or Territory to control or in any wise interfere with the transportation of liquors intended for shipment entirely through such a State or Territory and not intended for delivery therein or to control or in any wise to interfere with the delivery in the State or Territory of any bona fide interstate commerce shipment of liquor or liquids intended solely for the personal use of the original consignee, and not intended for sale in said State or Territory in violation of the laws thereof." [34] But serious doubts as to the right of Congress to delegate its authority to the states prevented the passage of the bill.

In the next Congress, there was considered the so-called Littlefield bill which provided that the interstate commerce character of shipments of intoxicating liquors should terminate upon their arrival within the boundary of the state of destination and before delivery to the consignee, and that the liquors and

[33] 58th Congress, 2d session, House Report 2337. The same bill, with the exception of a few minor additions had been favorably reported by the Committee on the Judiciary and had passed the House without a division on Jan. 27, 1903. (H. R. 15531, 57th Congress, 2d session, House Report 3377. See CONGRESSIONAL RECORD pp. 1327, 1331). The effect of Rhodes *v.* Iowa, the report said, "was practically to nullify the act of 1890 so far as the transportation and delivery of intoxicating liquors within the state was concerned." (House Report 3377).

[34] 58th Congress, 2d session, House Report 2337. The report said that these amendments were designed, in case the bill became law, to make it clear that "Congress did not *sub silentio* intend to authorize the State or Territory, under its own domestic law and policy" to interfere with through shipments, and "to meet the criticism, founded upon a misapprehension, that the bill was designed to deprive a citizen of one State of the right of having shipped to him from another State beer, wine, or other intoxicating liquors for his own use. Doubtless a fair construction of the bill without this amendment would leave the citizen in the enjoyment of this right—a constitutional right of which he can not be deprived by any legislative enactment." (pp. 2, 3).

the persons engaged in their shipment should become subject to the police regulations of the state of destination as though the liquors had been manufactured there. The state was prevented from interfering with through shipments, and a second section of the measure provided "that in all such shipments to be paid for on delivery, commonly called C. O. D. shipments, the sale shall be held to be made at the place of destination or where the money is paid or the goods delivered." [35]

Congressman Clayton pointed out that this bill did not follow the language of the Wilson Act which had been upheld, and went further in some particulars than the Hepburn-Dolliver measure. "Of course," he said, "the mere form is not material; it is the substance that is vital. It would be better to take the Wilson law, which has passed under judicial scrutiny, and amend it as it was proposed to do in the Hepburn-Dolliver bill than to adopt a new plan." Congressman Clayton favored a bill introduced by Congressman Brantley, but both thought that there were better chances of securing the passage of a law by pressing the Littlefield measure.[36]

Nevertheless, on February 1, 1907, Mr. Brantley, from the Committee on the Judiciary, reported an amended measure providing that a carrier acting as an agent in the collection of the purchase price of liquors "shall be subject in so doing to all the police powers of the State or Territory into which such liquors are transported and delivered and for this purpose in all cases of the sale of spirituous, vinous, malt, and intoxicating liquors of all kinds in interstate commerce, where the same is sold 'Collect on Delivery,' the place of delivery shall be deemed and held the place of sale." [37]

Here the attempt was made to overrule the decisions [38] of the United States Supreme Court which have already been cited as declaring that the Wilson Act did not empower the states to

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[35] H. R. 13655, 59th Congress, 2d session, House Report 6708 (Jan. 24, 1907).

[36] *Ibid.*, pp. 17, 19. Minority reports denied the expediency and the constitutionality of the proposed legislation. *Ibid.*, part 2.

[37] 59th Congress, 2d session, House Report 7115.

[38] American Express Co. *v.* Iowa, etc., *supra.*

prevent C. O. D. shipments and agency on the part of the carrier. But care had to be taken not to prevent the execution of a valid contract made in another state. The Littlefield bill, Mr. Brantley argued "is, in effect, to give to one State jurisdiction over the contract to sell made in another State, which contract to sell is 'the substance of the sale;' would be to give extraterritorial effect to the law of a State, and would be to give to the State the power to regulate interstate commerce in its fundamental aspect. None of these things can be constitutionally done. Another very serious effect of the Littlefield C. O. D. provision, and one that is entitled to very careful consideration, is, that under its operation, the act of a citizen in his own State, perfectly legal and proper under the laws of his State, would be criminal under the laws of another State; and not only criminal, but this very person, by the commission of an act lawful in his State, would actually be a criminal in another State without ever entering the territory of the latter State." [39]

These constitutional doubts prevented any favorable action by Congress on the measures proposed, and the same fate befell a number of bills introduced at the next session. These followed the same general lines and are chiefly notable because of the study given the problems by the lawyers on the Senate Judiciary Committee.[40] The opinion by Senator Knox has been much quoted—notably by President Taft in vetoing the Webb-Kenyon bill[41]—and deserves to be set forth here:

> "There are some constitutional questions closed beyond dispute. One is that Congress can neither add to nor take from the police power of the States. I think no one can seriously question the proposition that as the law now stands, under the decisions of the court, it is not within the police power of the State now to prevent the delivery to the consignee of an article purchased by him in another State, and if the passage of an act, such as proposed in these bills, would enable the States to interrupt interstate shipments it could scarcely be denied that the additional power

[39] House Report 7115, p. 6.

[40] See 60th Congress, 1st session, Senate Report 499 (reprinted as 61st Congress, 1st session, Senate Document 146).

[41] 63d Congress, 1st session, Senate Document 103.

was given to the States by act of Congress. In other words, the police power of the States would be extended by an act of Congress, which is a constitutional absurdity.

"I believe it is within the police power of the States to legislate against all devices resorted to by shippers and carriers whereby liquors are distributed to other than bona fide consignees. Kansas has an excellent statute upon this subject. I am likewise of the opinion that Congress, by legislation acting directly upon carriers, can prevent them from becoming agents for vendors in other States in collecting for liquors upon delivery and will gladly support a bill covering that field.

"My conclusions are:

"First. Interstate shipments are not completed until they reach the consignee.

"Second. An interruption or interference with interstate shipments before they reach the consignee constitutes a regulation of commerce.

"Third. Regulating interstate shipments is an exclusive function of Congress.

"Fourth. Congress can not delegate any part of its exclusive power to the States.

"Fifth. To remove the bar or impediment of exclusive Federal power which shuts the States out of the Federal domain and thereby allows them to enter that domain is to permit or sanction a State law in violation of the Constitution and in effect to delegate a Federal function to the States.

"For these and other reasons assigned, I am constrained to vote against the bills we have been considering."

Success, however, attended the prohibition advocates in 1913, when Congress passed the Webb-Kenyon Act [42] over the President's veto. This differed in theory from the measures hitherto proposed, being a positive prohibition of interstate commerce:

"AN ACT divesting intoxicating liquors of their interstate character in certain cases.

"* * * The shipment or transportation * * * of * * * intoxicating liquor * * * from one state * * * into any other state * * * which * * * intoxicating

[42] Act of March 1, 1913, 37 Stat. L. 699.

> liquor is intended, by any persons interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state * * * is hereby prohibited."

Its constitutionality and efficacy in enabling the states to enforce their laws are beyond the scope of this paper, but it may be remarked in conclusion that the Supreme Court, through Mr. Justice White, has just declared it constitutional in a sweeping decision [43] which, for the moment at least, makes appropriate state legislation operative. The discussion above of the License Cases and Leisy *v.* Hardin, and of the Wilson Act and Rhodes *v.* Iowa, indicates why I say "for the moment at least."

Lindsay Rogers.

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[43] James Clark Distilling Co. *v.* Western Md. Ry. Co., and James Clark Distilling Co. *v.* American Express Company, Nos. 75, 76 October Term, 1916, decided January 8, 1917.